Supreme Court, U.S.
FILED
JUN 15 1998
CLERK

No. 97-1841

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

---

ARTHUR CALDERON, Warden, California State Prison
at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**
**AND BRIEF IN OPPOSITION TO**
**PETITION FOR WRIT OF CERTIORARI**

---

NANCI L. CLARENCE
KATE JEFFERY STOIA
CLARENCE & SNELL, LLP
899 Ellis Street
San Francisco, CA 94102
(415) 749-1800
Attorneys for Respondent
FREDDIE LEE TAYLOR

34 pp

The respondent, FREDDIE LEE TAYLOR, requests leave to proceed in this matter and file a Brief in Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed before the United States District Court for the Northern District and the United States Court of Appeals for the Ninth Circuit. No affidavit is attached, inasmuch as the United States District Court and the United States Court of Appeals appointed counsel for petitioner pursuant to 21 U.S.C. section 848(q).

Dated: June 12, 1998

Respectfully submitted,

CLARENCE & SNELL, LLP

By: _____

NANCI L. CLARENCE
Attorneys for Respondent
FREDDIE LEE TAYLOR

No. 97-1841

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1997

---

ARTHUR CALDERON, Warden, California State Prison
at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

NANCI L. CLARENCE
KATE JEFFERY STOIA
CLARENCE & SNELL, LLP
899 Ellis Street
San Francisco, CA 94102
(415) 749-1800

Attorneys for Respondent
FREDDIE LEE TAYLOR

(CAPITAL CASE)

## Questions Presented

1. May a District Court hold in abeyance a habeas corpus petition containing exhausted claims while the state prisoner returns to state court to exhaust known, but as yet unexhausted, claims.

2. May a District Court permit amendment of any abeyant petition by the addition of claims following state court exhaustion.

## LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, was the petitioner in proceedings before the United States Court of Appeals for the Ninth Circuit, and is the petitioner in this Petition for Write of Certiorari.

The United States District Court for the Northern District of California was the respondent in proceedings before the United States Court of Appeals for the Ninth Circuit.

Freddie Lee Taylor, a state prisoner sentenced to death under the laws of the State of California, was the real party in interest in proceedings before the United States Court of Appeals for the Ninth Circuit, and is respondent in this Petition for Writ of Certiorari.

## TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE . . . . . 2

II. REASONS FOR DENYING THE PETITION . . . . . 6

A. Summary of Argument . . . . . 6

B. A District Court Has The Authority to Direct a Petitioner Such As Taylor To Amend His Petition By Deleting Unexhausted Claims . . . . . 10

C. Federal Courts Have Recognized The Propriety of Holding An Exhausted Habeas Petition In Abeyance Pending Exhaustion of State Remedies . . . . . 11

1. A District Court Has The Authority to Manage Its Own Docket By Holding An Exhausted Petition In Abeyance. . . . . 11

2. The Stay/Abeyance Procedure Implemented by the District Court Promotes Comity and Does Not Thwart Exhaustion Principles or Run Afoul of Rose v. Lundy. . . . . 12

3. The Procedure Utilized By the District Court Has Been Repeatedly Endorsed By The Ninth Circuit and the Courts Of Other Circuits. . . 14

D. The Interests of Judicial Economy and Avoiding Piecemeal Litigation Have Been Furthered by the District Court's Order Holding the Exhausted Claims in Abeyance Pending State Court Exhaustion. . . . . 17

E. The Stay and Abeyance Procedure Does Not Subvert the One Year Statute of Limitation Period Established by Amended 28 U.S.C. 2244(d). . . . . 18

F. The Stay/Abeyance Procedure and Subsequent Amendment of the Petition with the Newly Exhausted Claims Does Not Enable Taylor to Circumvent the Abuse of the Writ Doctrine. . . . . 20

## TABLE OF CONTENTS (cont'd)

G. The Equities Here Support the District Court's Decision to Hold the Exhausted Claims Petition in Abeyance Pending State Court Exhaustion. . . . . 21

III. CONCLUSION . . . . . 24

## TABLE OF AUTHORITIES

Page(s)

Cases:

Andrews v. Deland, 943 F.2d 1162 (10th Cir. 1991) . . . . . 16

Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983) . . . . . 16

Burris v. Farley, 51 F.3d 655 (7th Cir. 1995) . . . . . 16

Bush v. Singletary, 988 F.2d 1082 (11th Cir.1993) . . . . . 16

Calderon v. United States District Court (Beeler),
112 F.3d 386 (9th Cir.1997) . . . . . 19

Calderon v. United States District Court (Gordon),
107 F.3d 756 (9th Cir. 1997) . . . . . 4, 13-15, 23

Calderon v. United States District Court (Nicholas),
98 F.3d 1102 (9th Cir. 1996) . . . . . 3

Fetterly v. Paskett 997 F.2d 1295 (9th Cir.1993) . . . . . 14, 15, 22

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997),
cert. denied, 117 S.Ct. 794 . . . . . passim

Guizar v. Estelle, 843 F.2d 371 (9th Cir.1988) . . . . . 10

Hatch v. Oklahoma, 58 F.3d 1447 (10th Cir.1995) . . . . . 16

Hill v. Butterworth, 170 F.R.D. 509, 1997 WL 16132 *7
(N.D.Fla. Jan. 16, 1997) . . . . . 16

James v. Borg, 24 F.3d 20 (9th Cir. 1994),
cert. denied, 513 U.S. 935 (1994) . . . . . 10

Jeffries v. Wood 103 F.3d 827 (1996) . . . . . 19

Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993) . . . . . 16

Lindh v. Murphy __ U.S. __, 117 S.Ct. 2059 (1997) . . . . . 19

Lonchar v. Thomas, 116 S.Ct. 1293 (1996) . . . . . 22

McClesky v. Zant, 499 U.S. 467 (1991) . . . . . 18, 20

Mills v. Singletary, 63 F.3d 999 (11th Cir.1995) . . . . . 16

Moore v. Kemp, 809 F.2d 702 (11th Cir.1986) . . . . . 16

Moore v. Scully, 956 F.Supp. 1139 (S.D.N.Y. 1997) . . . . . 16

Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988) . . . . . 7, 11

Nichols v. Perini, 818 F.2d 554 (6th Cir. 1987) . . . . . 16

Palmer v. Grammar, 863 F.2d 588 (8th Cir.1988) . . . . . 16

Reutter v. Crandel, 109 F.3d 575 (9th Cir.1997) . . . . . 10

Roman v. Estelle, 917 F.2d 1505 (9th Cir.1990) . . . . . 10

Rose v. Lundy 455 U.S. 509 (1982) . . . . . passim

Simmons v. Lockhart, 915 F.2d 372 (8th Cir.1990) . . . . . 16

Stano v. Singletary, 952 F.2d 1273 (11th Cir.1992) . . . . . 16

Thompson v. Wainwright, 714 F.2d 1495 (1983) . . . . . 11, 16

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1997
No. 97-1841

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*

## I. STATEMENT OF THE CASE

The conviction and death sentence of respondent Freddie Lee Taylor (hereinafter "Taylor") were affirmed by the California Supreme Court on December 31, 1990.[1] The California Supreme Court had previously denied Taylor's state habeas corpus petition on September 26, 1990.

On June 12, 1992, the United States District Court for the Northern District of California appointed undersigned counsel to represent Taylor in federal habeas corpus proceedings. Notwithstanding the State's characterization of the proceedings in federal court, the record demonstrates that Taylor has proceeded with the utmost attention to all filing deadlines and has never sought any unwarranted delay. Taylor filed his first federal petition for Writ of Habeas Corpus in the district court on July 10, 1995. Pursuant to the Northern District Local Rules in effect at that time, Taylor's petition contained both exhausted and unexhausted claims. On August 14, 1995, the State filed a Motion to Dismiss Petition or, in the alternative, to Compel Exhaustion. Taylor opposed the State's motion and filed a Counter-motion for Leave to Conduct Discovery. On October 20, 1995, the district court heard arguments on the cross motions and issued oral rulings, including *inter alia*, the denial of the State's Motion to Dismiss and the partial granting of Taylor's Counter-motion for Discovery. At the hearing, the district court declined Taylor's offer to submit briefing stating his position concerning exhaustion. Instead, the district court issued a tentative ruling regarding exhaustion and stated that a formal order would follow.

The district court's final order on exhaustion was not issued until April 1, 1997. At that time, as the district court noted, "major developments ha[d] reshaped the law under which the

---

[1] People v. Taylor, 52 Cal.3d 719 (1990).

court must consider exhaustion and discovery issues." First, in October 1996, the Ninth Circuit held that discovery is not available in a habeas action prior to the filing of the finalized petition and also suggested that discovery on unexhausted claims is impermissible.[2] In light of that ruling, Taylor filed a Statement of Non-Opposition which accepted the district court's tentative ruling prohibiting discovery insofar as the "relevant discovery relates entirely to unexhausted claims."

The second major development affecting Taylor's federal proceedings occurred on April 24, 1996, almost a year after Taylor had filed his federal habeas petition. On that date, President Clinton signed into law the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[3] The AEDPA enacts, *inter alia*, a one year statute of limitations for all federal habeas petitions filed by state prisoners.[4] Following enactment of the AEDPA, Taylor filed an Ex-Parte Request for Status Conference and Briefing Schedule on June 18, 1996 in order to obtain the district court's guidance regarding the potential impact of the new Act. On August 15, 1996, Taylor submitted a letter expressing concern that no status hearing had been scheduled and also asking the Court to issue the exhaustion and discovery orders that the Court stated would be forthcoming. Due to the uncertainty of the scope and applicability of the AEDPA, and because written orders had not been issued by the district court regarding exhaustion and discovery, Taylor did not proceed with the discovery sought nor did he file a state exhaustion petition.

The third major development considered by the district court in resolving exhaustion issues

---

2 Calderon v. United States District Court (Nicholas), 98 F.3d 1102 (9th Cir. 1996).

3 Pub. L. 104-132, 110 Stat. 1214.

4 28 U.S.C. section 2244(d).

was the Ninth Circuit's decisions in Greenawalt v. Stewart[5] and Calderon v. United States District Court (Gordon),[6] issued on January 17 and February 21, 1997, respectively. In light of Greenawalt and Gordon, the State moved for reconsideration of the district court's preliminary oral rulings on exhaustion and discovery of October 20, 1995, and, in the alternative, for issuance of a written ruling on the State's Motion to Dismiss. While Taylor had no opposition to the State's alternative request for issuance of a written order (a result he also had been attempting to obtain), he opposed the State's request for reconsideration of its preliminary oral rulings of October 20, 1995 on the ground that as Greenawalt and Gordon did not compel dismissal of his petition.

A hearing on the State's motion was held in the district court on March 28, 1997, and on April 1, 1997, the district court issued a written order. In its order, the district court first engaged in a detailed analysis of Taylor's claims and ruled on their exhaustion status. The court held, *inter alia*, that it would permit Taylor 30 days to delete the unexhausted claims and that it would hold in abeyance an amended petition containing only exhausted claims while Taylor exhausted his remaining claims in state court. The court cautioned Taylor, however, that "if within 30 days of the date of its order [Taylor] had not resubmitted the petition with the unexhausted claims and allegations stricken, the court [would] dismiss the petition." The court further ordered Taylor to present his unexhausted claims to the California Supreme Court within 60 days of the date the amended petition was filed.

---

[5] 105 F.3d 1268 (9th Cir. 1997), cert. denied, 117 S.Ct. 794.

[6] 107 F.3d 756 (9th Cir. 1997).

In addition, the district court ordered that Taylor's indefinite stay of execution would be vacated upon filing of his amended petition and that he would receive a 60 day stay of execution within which he could seek a further stay from the California Supreme Court. Id. Finally, the court ordered Taylor to file a second amended federal petition upon completion of state proceedings and directed the State to respond within 30 days of the filing of the second amended petition. Id. The district court did not, however, consider any "abuse of the write" arguments or indicate how it would rule on any "abuse of the writ" challenge by the State to such a second amended petition.

Pursuant to the district court's orders, Taylor filed his First Amended Petition for Writ of Habeas Corpus on April 30, 1997, which contained only those claims determined to be exhausted by the district court. Taylor's indefinite stay of execution was vacated by order of the district court on May 7, 1997, at which time the court entered a temporary stay of execution, through and including June 29, 1997. On June 27, 1997, Taylor filed a petition for writ of habeas corpus in the California Supreme Court, which contained those claims determined to be unexhausted by the district court in its written order of April 1, 1997. The State, after seeking four extensions, filed its Informal Response to the Petition on June 1, 1998. Pending state court exhaustion, Taylor's exhausted claims petition is currently being held in abeyance pursuant to the district court's order. Taylor's federal stay of execution has expired and he will not seek further action by the federal district court until his remaining claims have been reviewed by the state court.

On May 14, 1997, the State filed a Petition for a Writ of Mandate before the Ninth Circuit Court of Appeals. The court denied the petition and denied the State's petition for rehearing and suggestion for rehearing *en banc*. On May 12, 1998, the State filed a Petition for Writ of

Certiorari before this Court; the Petition was placed on the docket on May 14, 1998.

## II. REASONS FOR DENYING THE PETITION

### A. Summary of Argument

The current procedural posture of this case — challenged here by the State — does not constitute a recurring problem because the local rule on which petitioner relied *is no longer in effect*. Nor, following the Ninth Circuit's Greenawalt ruling, may such a rule be resurrected. Simply put, the procedural posture of Taylor's case *cannot recur* given the recent changes in the law. The State therefore requests that this Court issue a ruling which will affect a handful of cases at best. Taylor urges this Court to decline the State's invitation.

In reaching their decisions in this case, both the district court and the Ninth Circuit relied heavily on the fact that petitioner had carefully and diligently followed the law in effect at the time his federal petition was filed. Notwithstanding the State's alarmist arguments, the plain fact is that the "stay and abeyance" mechanism employed in this case by the district court, and sanctioned by the Ninth Circuit, is not a practice that will likely be followed by Courts in the future as the procedural underpinnings presented here will not arise again. Put in context, the stay and abeyance procedure was a measured response to manage petitions brought during a maelstrom of changes in the law, a circumstance which only existed for a brief window of time. In fact, the procedure affects only the very few habeas petitions, such as Taylor's, which were filed as mixed petitions during the narrow window of time *after* the adoption of a Northern District Local Rule which allowed stay and abeyance of habeas petitions and *before* January 17, 1997, the date of the Ninth Circuit's Greenawalt decision holding that the Local Rule's procedure was improper. All habeas petitioners who filed petitions during that time were bound by (and justifiably relied on)

former Local Rule 296-8(e), adopted by the district courts of the Northern District of California in 1988 (or its analog in other districts). Former Local Rule 296-8(e) set forth an abeyance procedure under which the district court was to determine whether a newly filed petition contained unexhausted claims and, if it did, hold the entire (mixed) petition in abeyance while the petitioner exhausted those claims in state court. Former Local Rule 296-8(e) was itself the result of the 1988 Ninth Circuit case of Neuschafer v. Whitley, in which the court stated that a district court may hold a mixed habeas petition in abeyance while the petitioner exhausts his unexhausted claims.[7] Despite the State's current insistence that such a practice violates long-standing precedent, review of the Ninth Circuit's Neuschafer ruling was not sought by the State.

Nor did the State ever seek review of the former Local Rule's abeyance mechanism. In January of 1997, the Ninth Circuit essentially reversed itself without prompting from the State, holding that a district court would abuse its discretion by following the former Local Rule and holding a mixed petition in abeyance rather than dismissing it.[8] The Ninth Circuit reiterated this position in February of 1997, firmly stating that a mixed petition must be dismissed and vacating the portion of the district court's order in that case which relied on former Local Rule 296-8(e).[9] Therefore, after Greenawalt and Gordon, a *mixed* petition, such as the one properly filed in this case in reliance on former Local Rule 296-8(e), must be dismissed and may not be held in abeyance. A petitioner seeking habeas relief following Greenawalt and Gordon is on notice that

---

[7] Neuschafer v. Whitley, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988).

[8] Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997).

[9] Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir. 1997).

any federal petition *must* contain exhausted claims only. It is noteworthy that the only case which the State cites in support of its claim that the stay and abeyance mechanism "has become the norm"[10] is a case in which the federal habeas petition had been filed *after* Greenawalt, when the Local Rule upon which Taylor reasonably and justifiably relied was *no longer in effect*.[11] Unlike the petitioner in that case, however, Taylor justifiably relied on the Northern District Local Rule in bringing his petition. At the time that Taylor filed his petition, in July of 1995, the Local Rule permitted him to file a mixed petition, and Taylor carefully followed that rule so as not to jeopardize any of his claims. Both the district court and the Ninth Circuit recognized the importance of the fact that Taylor had reasonably and justifiably relied on the former Local Rule, and the district court carefully fashioned a remedy — the stay and abeyance mechanism employed here — which would not unduly jeopardize Taylor's claims, given the changes in the law. It is this rapidly shifting legal landscape that prompted courts to utilize the stay/abeyance procedure.

The central harm complained of by the State in its Petition — that the district court's stay and abeyance of Taylor's habeas petition will "avoid the abuse of the writ doctrine"[12] — is not yet ripe for adjudication by this Court, because it has not yet occurred. Under the Order entered by the district court in this case, Taylor has amended his federal habeas petition so that it contains only *exhausted* claims. The district court has stated that it will hold this petition in abeyance while Taylor returns to the California Supreme Court to exhaust his as-yet unexhausted claims. Once

---

[10] State's Petition, p. 5, fn 1.

[11] Ashmus v. Caldron, 977 F.Supp. 987 (N.D.Cal. 1997).

[12] State's Petition, p. 5.

Taylor exhausts those claims, and assuming relief is not granted by the California Supreme Court, the district court has ordered him to amend his current habeas petition so that it contains all of his exhausted claims. The State will then have an opportunity to respond to the amended federal petition.

The State's putative concern is that the amended petition which eventually may be filed will not be subject to an abuse of the writ challenge. In fact, the State has returned to this point again and again, at every stage of these proceedings. The plain fact is, however, that this issue was not fully briefed in either of the lower courts and, significantly, neither court has yet made a determination on this issue as it was never properly before them. Both the district court and the Ninth Circuit concluded that any ruling on the State's abuse of the writ argument would be *premature* because *Taylor has not yet and may never file a petition which could even be challenged on that basis*. The State now asks this Court to issue the same type of advisory opinion which the lower courts wisely declined to issue. This Court should similarly decline the State's invitation.[13]

Nor does Taylor's case implicate the one-year statute of limitations under the AEDPA because Taylor's habeas petition was filed well before the AEDPA was signed into law. The AEDPA therefore has no application to this case whatsoever.

Finally, in light of the specific facts of this case, the district court narrowly tailored a remedy which promoted both comity and judicial economy. The district court also expressly

---

[13] Significantly, this Court very recently held that it would not issue a declaratory judgment on the question of whether Chapter 154 of the AEDPA applies to the State of California. Calderon v. Ashmus, __ U.S. __ (May 26, 1998). The Court held that the matter was not justiciable under the Declaratory Judgment Act because the petitioner essentially sought an advance ruling upon a hypothetical state of facts. The same is true here because Taylor has not yet (and may never) return to federal court to seek to amend his currently filed habeas petition.

recognized the utmost good faith in which Taylor filed his petition in reliance on the Local Rule then in effect and the fact that Taylor has diligently prosecuted his case ever since. This Court should decline the State's invitation to scrutinize the fact-specific, narrow holdings of the district court and the Ninth Circuit in this case.

## B. A District Court Has The Authority to Direct a Petitioner Such As Taylor To Amend His Petition By Deleting Unexhausted Claims.

The State has not challenged the first step of the procedure adopted by the district court in this case, nor could it. Having found that Taylor's petition was mixed rather than fully exhausted, the district court first ordered Taylor to amend his petition by deleting unexhausted claims and filing an amended petition containing only exhausted claims. As this Court is well aware, the district court had to look no further than this Court's holding in Rose v. Lundy[14] for the authority to so order. In Rose, this Court explained that when a petition is found to contain unexhausted claims, the petitioner "can always amend the petition to delete the unexhausted claims" in lieu of suffering a dismissal.[15] The district court's conclusion was likewise consistent with a long line of Ninth Circuit precedent.[16]

---

[14] 455 U.S. 509 (1982).

[15] Id. at 522.

[16] See, e.g., Reutter v. Crandel, 109 F.3d 575 (9th Cir.1997) (petitioner may choose to strike unexhausted claims) ; James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994) (citing Rose for proposition that "a petitioner may . . . choose to strike any unexhausted claims . . ."), cert. denied, 513 U.S. 935 (1994); Roman v. Estelle, 917 F.2d 1505, 1506 (9th Cir.1990) (holding petitioner must be given opportunity to amend mixed petition to include only the exhausted claims); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir.1988) (holding petitioner may resubmit petition with only exhausted claims); Ostrosky v. State of Alaska, 913 F.2d 590, 593 (9th Cir. 1990) (petitioner permitted to amend petition to delete unexhausted claim without first having to suffer a dismissal);

(continued...)

## C. Federal Courts Have Recognized The Propriety of Holding An Exhausted Habeas Petition In Abeyance Pending Exhaustion of State Remedies.

### 1. A District Court Has The Authority to Manage Its Own Docket By Holding An Exhausted Petition In Abeyance.

Contrary to well-established rules and procedures, the state seeks relief which effectively asks this Court to intrude on the district court's authority to manage its case docket. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court requires the district court, once it determines that a habeas petition is not patently frivolous, to order respondent to file an answer or other pleading within a time period fixed by the court, "*or to take such other action as the judge deems appropriate.*"[17] As the Advisory Committee Note indicates, the purpose of this language is to "afford the judge flexibility" where either dismissal or an order to answer may be inappropriate.

This rule simply confirms the generally recognized principle that a district court "has the power to control its docket."[18] In addressing a nearly identical situation, the Eleventh Circuit Court of Appeals responded to a similar claim in language that bears repeating here:

> The State's contention that the district court had no power to grant a continuance of the habeas petition pending before it, or abused its discretion in doing so, is patently without merit. The court has the power to control its docket. So long as it abides by the limits of discretion, it can leave a habeas petition dormant on its docket while the petitioner presents to the state court unexhausted claims.

---

[16](...continued)
Neuschafer, 860 F.2d 1470 at 1475 (citing Rose for proposition that a petitioner "may be allowed to amend his petition to delete the unexhausted claims").

[17] (Emphasis added).

[18] Thompson v. Wainwright, 714 F.2d 1495, 1499 (11th Cir. 1983).

> The express aim of the district court, set out in its carefully phrased order, was to enable all constitutional claims to be settled in one federal habeas proceeding. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982) does not forbid the continuance. The petitioner did not file a mixed petition seeking rulings on unexhausted claims. To the contrary, he asked that ruling on his exhausted claims be withheld until unexhausted claims could be presented to the state court and then all claims, properly exhausted, considered in the federal court at one time. *This furthers the interests underlying Rose rather than impedes them.*[19]

The discussion in Thompson highlights the absurdity of the State's claim that the procedure employed here is inconsistent with the United States Supreme Court's decision in Rose. Indeed, the district court here has chosen the stay/abeyance procedure as the most efficient and equitable method of managing this case while furthering the interests of comity, judicial economy, and avoiding piecemeal litigation. The exhausted claims will remain dormant on the district court's docket only while Taylor awaits decision by the California Supreme Court on his remaining claims, filed in that court on June 27, 1997.

**2. The Stay/Abeyance Procedure Implemented by the District Court Promotes Comity and Does Not Thwart Exhaustion Principles or Run Afoul of Rose v. Lundy.**

In Rose v. Lundy, supra, this Court held that a state prisoner's petition for writ of habeas corpus in a federal court based on an alleged federal constitutional violation will not be granted unless the petitioner has exhausted the remedies available in state court. The central concern of this Court in Rose was *not* to ensure that the habeas proceedings moved as rapidly as possible, as the State seems to suggest, but rather to ensure the preservation of comity between the state and federal courts by requiring that each claim advanced in federal court had first been presented to the highest state court available. The Rose Court recognized the important role reserved for state

---

[19] Id. (Emphasis added).

courts in the federal habeas arena and strove to protect it to the greatest degree possible. This Court emphasized that the rule which it announced "promotes comity and furthers the purposes underlying the exhaustion doctrine . . . of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings." Id.

In this case, Taylor acknowledges that under Rose, as interpreted by this Court in Greenawalt and Gordon, a district court may neither stay nor adjudicate a *mixed* petition. Holding an *exhausted* claims petition in abeyance, however, does nothing to offend the principle of comity — to the contrary, the procedure actually *promotes* comity — and is therefore entirely consistent with this Court's holding in Rose.

Pursuant to the district court's order, Taylor filed his unexhausted claims in the California Supreme Court on June 27, 1997 and the district court will not entertain those claims until they have been reviewed by the state court. All that remains in federal court is a fully exhausted petition, which the district court will not address until the state court has completed its review of Taylor's remaining claims. Moreover, the district court has vacated its stay of execution and ordered that any further stay of execution pending exhaustion must be sought by Taylor in state court. Taylor has not initiated further action or sought relief in federal court, nor does he intend to do so until the California Supreme Court has had the opportunity to review -- and perhaps grant relief on -- his unexhausted claims. Thus, by holding the *exhausted* claims in abeyance and vacating the federal stay of execution, there is no conceivable intrusion into or interference with state and federal court comity.

//

//

### 3. The Procedure Utilized By the District Court Has Been Repeatedly Endorsed By The Ninth Circuit and the Courts Of Other Circuits.

While both this Court and the Ninth Circuit have explicitly held that a federal district court may not hold a *mixed* petition in abeyance pending the exhaustion of state claims by a petitioner, there exists no authority from any court which mandates the dismissal of a fully *exhausted* petition. Likewise, no case or rule directs a federal district court that it must order the respondent to answer or otherwise respond to a petition within any specific amount of time. Such decisions have always been (and are properly) left to the district court under its inherent power to manage its own docket.

In fact, the law of the Ninth Circuit is explicit on this point. Under Ninth Circuit law, a district court has the authority and discretion to hold a federal petition containing only exhausted claims in abeyance pending state court exhaustion and to allow subsequent amendment with the newly exhausted claims. Such discretion remains undisturbed by the Greenawalt and Gordon decisions. For example, in Fetterly v. Paskett,[20] the Ninth Circuit applied the liberal amendment standards of Rule 15 in holding that a district court erred when it refused to stay federal habeas proceedings, hold the petition in abeyance pending exhaustion of state remedies, and allow the petitioner to amend his federal petition with the newly exhausted claims. Fetterly's lawyer, who represented him at all stages of the state court proceedings, had filed a fully exhausted federal habeas petition on his behalf. Several months later, a second lawyer entered the case and, on the basis of a state court decision issued six days before Fetterly's federal habeas petition was filed, filed a second state habeas petition asking the federal district court to stay the federal proceedings to allow him to exhaust the new claim. The district court denied the request. Id. at 1298. The

---

[20] 997 F.2d 1295 (9th Cir.1993).

Ninth Circuit ruled that it was an abuse of discretion to deny the request for a stay because Fetterly's unexhausted claim was cognizable on federal habeas and because his counsel may have been ineffective in failing to raise the unexhausted claim in state court. Id. at 1302. In reaching this result, the Ninth Circuit noted that,

> it is understandable that [counsel] wished to bring all his claims in one pending proceeding rather than move to dismiss and start again when he had fully exhausted his new issues. There is nothing at all in this record to suggest that the motion for a stay was brought to delay, to vex, or to harass, or that the request was an abuse of the writ.

Fetterly, 997 F.2d at 1302.

Fetterly remains good law in the Ninth Circuit. Indeed, the Ninth Circuit suggested in Greenawalt and Gordon that the holding of Fetterly can be applied to hold a fully exhausted petition in abeyance while a petitioner presents his unexhausted claims in state court. Both cases held that although a district court does not have the authority to stay a *mixed* petition, a federal petition containing only *exhausted* claims may be stayed by the district court under its inherent power to manage its own docket. In Greenawalt, the Ninth Circuit expressly noted that:

> "In Fetterly, we held that a district court should have stayed, rather than dismissed, a valid habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court. *A district court has discretion to stay a petition which it may validly consider on the merits.*"[21]

Accordingly, under Ninth Circuit law, an exhausted federal petition may be stayed by a federal district court while unexhausted claims are pursued in state court.

Nor is there any conflict between the Circuit Courts on this point. The practice of staying an exhausted petition while unexhausted claims are pursued in state court, designed to achieve

---

[21] Greenawalt, 105 F.3d at 1274 (emphasis added).

equally the goals of judicial economy and fairness, is consistent with that endorsed in other circuits.[22] The abeyance procedure also has been utilized by circuit courts to permit exhaustion of state remedies. [23]

---

[22] See, e.g., Burris v. Farley, 51 F.3d 655, 658 (7th Cir. 1995) (noting that filing a petition raising exhausted claims and asking the court for a stay until the remaining issues have been exhausted is appropriate and analogous to asking a district court to suspend proceedings in civil litigation where one or more claims is unripe, but other ripe claims must be filed within a specified statute of limitations); Lawson v. Dixon, 3 F.3d 743, 748 (4th Cir. 1993) (noting magistrate judge held proceedings in abeyance pending resolution of relevant state court proceedings), cert. denied 510 U.S. 1171 (1994); Andrews v. Deland, 943 F.2d 1162, 1168, n.3 (10th Cir. 1991) (noting district court stayed proceedings pending exhaustion of state remedies), cert. denied, 502 U.S. 1110 (1992); Simmons v. Lockhart, 915 F.2d 372, 377 (8th Cir.1990) (citing cases); Nichols v. Perini, 818 F.2d 554, 556 (6th Cir. 1987) (noting that district court held proceedings in abeyance to permit exhaustion); Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983) (federal proceedings should be held in abeyance in interests of judicial economy until all claims are exhausted in state proceedings), cert. denied, 469 U.S. 1127 (1985); Thompson v. Wainwright, 714 F.2d 1495, 1499 (1983) (district court's order leaving habeas petition "dormant" on its docket while petitioner presented unexhausted claims to state court furthers interests underlying Rose v. Lundy, supra, 455 U.S. at 509, where petitioner filed exhausted claims only petition); Moore v. Scully, 956 F.Supp. 1139 (S.D.N.Y. 1997) (district court granted motion to hold in abeyance and placed case on "suspense docket" to permit exhaustion); cf. Stano v. Singletary, 952 F.2d 1273 (11th Cir.1992) (granting petitioner's motion and remanding with instructions to permit exhaustion); Hill v. Butterworth, 170 F.R.D. 509, 1997 WL 16132 *7 (N.D.Fla. Jan. 16, 1997) (in certifying the action as a class action and declaring that Chapter 154 of the 1996 Act does not apply to Florida capital petitioners, court notes that habeas proceedings have been held in abeyance to await court's determination).

[23] See, e.g., Hatch v. Oklahoma, 58 F.3d 1447, 1452 (10th Cir.1995) (appeal held in abeyance "pending petitioner's exhaustion of his claims in state court"), cert. denied, 116 S.Ct. 1881 (1996); Bush v. Singletary, 988 F.2d 1082, 1086 (11th Cir.1993) (appeal held in abeyance for petitioner to present unexhausted claim to Florida Supreme Court), cert. denied, 510 U.S. 1065 (1994); Palmer v. Grammar, 863 F.2d 588 (8th Cir.1988) (appeal held in abeyance "pending resolution of all proceedings in the Nebraska state courts"); Moore v. Kemp, 809 F.2d 702, 731 (11th Cir.1986) (appeal held in abeyance to permit presentation of unexhausted claims to state courts), cert. denied, 481 U.S. 1054 (1987); cf. Mills v. Singletary, 63 F.3d 999, 1008, n.10 (11th Cir.1995) (appeal held in abeyance on petitioner's motion to litigate recently exhausted claims filed in a successor petition in the district court), cert. denied, 116 S.Ct. 1837 (1996).

D. **The Interests of Judicial Economy and Avoiding Piecemeal Litigation Have Been Furthered by the District Court's Order Holding the Exhausted Claims in Abeyance Pending State Court Exhaustion.**

Not surprisingly, the State fails to address the significant drain on judicial resources that would result from forcing Taylor to elect between taking a dismissal without prejudice and then re-filing after exhaustion or pursuing only his exhausted claims forthwith. To the contrary, the State makes the blanket claim that "abeyance is the antithesis of prompt resolution,"[24] a statement which initially sounds convincing but which rings hollow when the facts of this case are examined. As noted by the district court, proceeding on the exhausted claims now would force Taylor to litigate the unexhausted claims in a successor petition, which "would only result in piecemeal litigation, a result the exhaustion and abuse of the writ doctrines are designed to avoid."[25] Had the district court denied the stay, there would have been a substantial risk that adjudication of the exhausted claims in federal court would have been completed before the state court disposed of the unexhausted claims, thus making a successive petition and multiple appeals a virtual certainty. Conversely, the possibility that the California Supreme Court may grant relief on any one of the unexhausted claims could render federal proceedings to adjudicate the exhausted claims useless -- a potential further waste of judicial resources.

Furthermore, the factual and legal interrelation of Taylor's exhausted and unexhausted claims makes it most efficient to adjudicate the claims in one proceeding. Once state exhaustion is complete, federal proceedings will resume and all claims will be litigated in an orderly fashion

---

[24] State's Petition, p. 16.

[25] Appendix to State's Petition, p. 45.

in one petition.[26] By contrast, the State's proposed alternative of adjudicating the exhausted claims now, then returning with the newly exhausted claims later, would result in a substantial waste of resources. For example, the district court might be burdened with multiple evidentiary hearings, shifting representation of counsel, and duplicative investigation costs and expert fees.

Even if Taylor had exercised the option of a dismissal without prejudice, the re-filing of a subsequent petition would likely cause unnecessary and wasteful litigation because the State would assert the applicability of the AEDPA and its statute of limitations despite the fact that case petitioner diligently pursued his claims and filed them in federal court before AEDPA became law. Thus, in the interests of conserving scarce judicial resources, the district court should be permitted to use these reasonable means to ensure that all claims are litigated in a single proceeding.

**E. The Stay and Abeyance Procedure Does Not Subvert the One Year Statute of Limitation Period Established by Amended 28 U.S.C. 2244(d).**

In further support of its Petition, the State argues that the stay/abeyance procedure subverts the one-year limitation period for filing a petition established by the AEDPA. The State's argument is based purely on its speculation about what *might* occur in the future. According to the State, whose argument *assumes* that the California Supreme Court will not grant relief on the pending exhaustion petition, if the district court were to subsequently permit Taylor to amend his petition to add the newly exhausted claims (which claims would not otherwise meet the limitation period), this procedure would subvert the statute. In light of recent Ninth Circuit and United States Supreme Court developments, however, this argument is moot and must fail as applied to Taylor because his petition was filed nine months *before* the Act and the Act therefore has no

---

[26] See McClesky v. Zant, 499 U.S. 467, 498 (1991).

application to his petition.

In December 1996, the Ninth Circuit held in Jeffries v. Wood,[27] that the Act's amendments to Chapter 153 of the AEDPA, which includes section 2244(d) (the one year statute of limitations), do not apply to "cases filed" in the federal courts of the Ninth Circuit before the Act's enactment." The Ninth Circuit subsequently clarified that "cases filed" in federal court are those in which a habeas petition was filed prior to the Act's effective date.[28] Although a Writ of Certiorari was sought in that case, it was denied by this Court.[29] Any ambiguity regarding the applicability of the AEDPA to this case was resolved in Lindh v. Murphy,[30] where this Court unequivocally held that the new provisions of Chapter 153 of the AEDPA, which include the one year statute of limitations, apply only to cases filed *after* the Act became effective. Taylor filed his federal habeas petition pursuant to the mandates of a Local Rule in July, 1995, *nine months before* enactment of the AEDPA.

The district court's order does not subvert the AEDPA's statute of limitations because the AEDPA does not apply to Taylor. Nor should the State should be permitted to use Rose and Greenawalt to thwart Congress's intent that the AEDPA should not apply to pending cases.

//

//

---

27 103 F.3d 827 (1996).

28 Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir.1997).

29 __ U.S. __, 118 S.Ct. 1389 (April 6, 1998).

30 __ U.S. __, 117 S.Ct. 2059 (1997)

F. **The Stay/Abeyance Procedure and Subsequent Amendment of the Petition with the Newly Exhausted Claims Does Not Enable Taylor to Circumvent the Abuse of the Writ Doctrine.**

The State argues that the district court's intent to permit Taylor to amend his federal habeas petition following exhaustion of his currently unexhausted claims in state court violates the abuse of the writ doctrine. The State quotes this Court in Rose v. Lundy for the proposition that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"[31] and then argues that the principle of abuse of the writ applies equally to amended petitions, despite the fact that Rose spoke only of "subsequent" petitions.

The State's concern with prospective amendment under Rule 15 is premature and should not be entertained at this time. Taylor has *not yet attempted* the procedure which the State seeks to challenge. Nor has either side fully briefed the issue. Finally, and perhaps most important, this issue has never been placed squarely before the lower courts, nor could it have been, given the procedural posture of this case. Neither lower court issued a ruling on this issue: instead, both the district court and the Ninth Circuit declined to issue an advisory opinion on an issue that had not yet become ripe for review.

Moreover, the stay/abeyance procedure implemented by the district court furthers the policies underlying the abuse of the writ doctrine, which is deeply rooted in the need for finality and conservation of judicial resources.[32] As discussed above, the stay/abeyance procedure will

---

[31] Rose, 455 U.S. at 521.

[32] See McClesky, 499 U.S. at 493-494.

discourage piecemeal litigation and conserve judicial resources because the district court will adjudicate a single petition upon completion of state court exhaustion. By contrast, the procedure urged by the State — having the district court litigate the exhausted claims now and the newly exhausted claims later — will substantially burden the district court with multiple petitions. Similarly, the stay/abeyance procedure implemented by the district court does not impede the State's interest in finality. Indeed, the only possibility of delay at this stage rests with the California Supreme Court, which is presently considering Taylor's unexhausted claims. The State's claim that *petitioner* has sought to delay adjudication of the petition is belied by the ____ extensions of time which the *State* sought from the California court for the filing of the State's informal response to Taylor's pending exhaustion petition. Finally, it should be noted that the State's disingenuous concerns with the abuse of the writ doctrine are merely a smokescreen for its true agenda: forcing a dismissal of Taylor's petition and later arguing that a re-filed petition is untimely under the AEDPA's statute of limitations or, in the alternative, enlisting the assistance of the district court (and this Court) in forcing Taylor into a successor posture. Surely, the abuse of the writ doctrine was not designed to advance such a result which would cast AEDPA's net to cover cases filed *well before* AEDPA's enactment.

## G. The Equities Here Support the District Court's Decision to Hold the Exhausted Claims Petition in Abeyance Pending State Court Exhaustion.

After correctly determining that Ninth Circuit authority provided it with discretion to employ the stay/abeyance procedure at issue here, the district court proceeded carefully and thoughtfully to assess the equities of this case, and found substantial reasons to exercise its discretion. Taylor submits that such equities, worth reiterating here, should lead this Court to

decline the State's invitation to review the district court's order and the Ninth Circuit's decision to uphold that order.

Like the petitioner in Fetterly, Taylor did not seek a stay "to delay, to vex, or to harass."[33] Unlike the petitioner in Greenawalt, Taylor did not submit a bare-bones successor petition containing only a single unexhausted claim and filed on the eve of the passage of the AEDPA; rather, he filed a fully-developed petition containing numerous fully exhausted claims (an, in keeping with the former Local Rule, other unexhausted claims) nine months before enactment of the AEDPA. Moreover, this Court has suggested that the equities favoring a stay are also greater where the petition, such as the petition at issue here, is a *first* rather than a successive petition.[34]

Taylor has at all times acted in accordance with the case law, orders and local rules of the district court, the Ninth Circuit, and this Court. As described above, Taylor initially filed a mixed petition in accordance with the former Northern District Local Rules. After filing his petition, Taylor repeatedly sought guidance and clarification from the district court; he should not be penalized now for this diligence. As noted by the district court, Taylor's reliance on Local Rule 296-8(e), which governed his case at the time of filing, provided him with clear guidance and justification for not presenting his unexhausted claims to the state court earlier: "Before Greenawalt and Gordon were decided, (Taylor) was fully justified in believing he could file a mixed petition, obtain a ruling on the exhaustion status of the claims, and then present the

---

[33] Fetterly, 997 F.2d at 1302.

[34] Lonchar v. Thomas, 116 S.Ct. 1293, 1299 (1996) ("dismissal of a first federal petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

unexhausted claims to the state court."[35]

Moreover, the State's insinuation that Taylor chose to sit passively by while he awaited the district court's exhaustion ruling is completely disingenuous, unfounded, and contrary to the record. Indeed, Taylor made numerous attempts to obtain a ruling so that he could proceed to exhaust his claims in state court. First, at the October, 1995 hearing on Respondent's Motion to Dismiss, Taylor offered to submit briefing as to which claims he deemed exhausted; the court declined.

Rather than waste state judicial resources by filing a state petition in which he essentially guessed on the court's view of which claims were exhausted (necessarily erring on the side of over-inclusiveness), Taylor continued to await the district court's order. Significantly, however, he made further attempts to obtain the orders which the district court indicated would be forthcoming and to seek guidance as to the applicability of the AEDPA. First, following enactment of the AEDPA, Taylor filed an Ex-Parte Request for Status Conference and Briefing Schedule on June 18, 1996 setting forth the substantive new issues created by the AEDPA and seeking the court's guidance regarding the potential impact of the new Act. No response was issued by the district court. Accordingly, on August 15, 1996, Taylor submitted a letter expressing concern that no status hearing had been scheduled and also inquiring about the pending and un-issued orders regarding exhaustion and discovery that were promised by the district court.

---

[35] State's Appendix to Petition for Writ of Certiorari at 44.

Significantly, the district court explained that in light of Greenawalt and Gordon, "petitioners from here forward will have a lesser reliance interest," thus rendering moot the State's argument that staying the exhausted claims will only encourage petitioners to file mixed petitions in the future. Id. at 46.

These efforts can hardly be characterized as 'sitting passively.' To the contrary, Taylor followed the explicit instructions of the district court at all times and pursued all avenues of communication available to clarify his position.

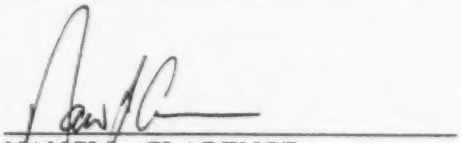
## III. CONCLUSION

The district court here fashioned a narrow remedy in response to a unique factual situation in a shifting legal landscape. The district court's order promotes comity and does not violate, either in letter or in spirit, any ruling of a higher court. The central harm of which the State complains — the possibility that a future court may find that the petition, once refiled, constitutes abuse of the writ — is prematurely before this Court, not having been briefed or decided by any lower court. This Court should deny the State's Petition for Writ of Certiorari at this time.

Dated: June 12, 1998

Respectfully submitted,

CLARENCE & SNELL, LLP

By: 

NANCI L. CLARENCE
Attorneys for Respondent
FREDDIE LEE TAYLOR

PROOF OF SERVICE

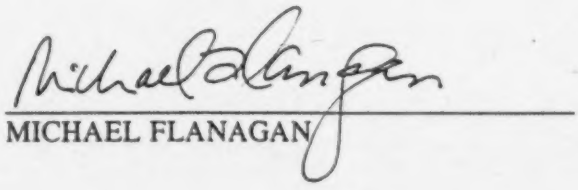
I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action. My business address is 899 Ellis Street, San Francisco, California 94109. On the date specified below, I served by mail, a true and correct copy of the attached document:

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

by placing the same in an envelope, sealing, fully prepaying postage thereon and depositing said envelope in the U.S. Mail at San Francisco, California. Said envelope was addressed as follows:

Joan Kileen
Deputy Attorney General
50 Fremont Street, Room 300
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 12, 1998, at San Francisco, California.



MICHAEL FLANAGAN